

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 15, 2006

**GEORGE EDWIN HARDIN V. STATE OF TENNESSEE AND
VIRGINIA LEWIS, WARDEN**

**Direct Appeal from the Criminal Court of Bledsoe County
No. 59-2005 Buddy D. Perry, Judge**

E2005-02944-CCA-R3-HC - Filed November 28, 2006

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Criminal Court is Affirmed**

Petitioner, George Edwin Hardin, was convicted by a Lauderdale County jury of first degree murder and received a sentence of life in prison. On August 5, 2005, petitioner filed a *pro se* petition for writ of habeas corpus in the Bledsoe County Criminal Court. On November 22, 2005, the trial judge dismissed the petition without an evidentiary hearing or the appointment of counsel. Petitioner filed a motion asking the trial court to make additional findings of fact and to set aside the order of dismissal. When the trial court denied petitioner's request on December 15, 2005, petitioner timely appealed. Following our review, we affirm the judgment of the trial court.

J. S. DANIEL, Sr.J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., and ALAN GLENN, J., joined.

Paul G. Summers, Attorney General and Reporter; Blind Akrawk, Assistant Attorney General; James Michael Taylor, District Attorney General, for the Appellee, State of Tennessee.

George Edwin Hardin, Appellant, Pro Se.

OPINION

BACKGROUND

In June 1987, while serving a sentence at a state correctional facility then known as Fort Pillow State Farm and Prison in Lauderdale County, the petitioner and another inmate were charged with the murder of a fellow inmate named James Sherill. On February 12, 1988, the petitioner was convicted of first degree murder following a jury trial. This court affirmed that conviction on direct appeal, State v. Larry David Reeves & George Edwin Hardin, No. 3, 1989 WL 73005 (Tenn. Crim. App. filed July 5, 1989). The facts of that homicide are best summarized by the court in that direct appeal as follows:

On the afternoon of June 13, 1987, the appellants, inmates confined to Fort Pillow State Farm and Prison, attacked a fellow inmate, James Sherill, after the inmates had been released from their cells to attend the evening meal. An autopsy revealed that the victim had been stabbed ten times. The cause of death was a stab wound which penetrated the victim's rib cage and heart.

The appellants attacked the victim in a common area inside the cell block. Hardin held the victim from behind while Reeves attacked the victim. Reeves was seen striking the victim in the chest. After prison guards intervened, the victim was able to escape from the appellants. However, Hardin followed the victim and continued to beat him with his fists until restrained by the guards. Reeves, standing near the site where the second affray occurred, had a shank, a prison made knife, in his hand.

The shank recovered from Reeves had blood on it. A scientific analysis of the shank revealed the presence of blood and human tissue. The stab wounds to the victim's body were consistent with the size and shape of the shank.

As the appellants were being escorted to a holding cell, Hardin told Reeves that "he would take the blame" because "he did the sticking." Reeves, a self-proclaimed jailhouse lawyer, told Hardin that he would take care of the matter.

The appellants denied they stabbed the victim. Hardin admitted that he struck the victim with his fists.

Joe Ogle, a fellow inmate, testified as a defense witness. Ogle related that the victim possessed a shank on the evening in question. When it appeared the victim was going to attack him with the shank, he kicked the victim and the shank fell to the floor. Ogle stated he retrieved the shank and stabbed the victim. Ogle's testimony was impeached in many respects.

The appellants and William Anthony Black, Ogle's cellmate, testified that Sherill came walking towards cell 14, where Black and the appellants were standing, struck Hardin from behind, and a fight ensued between Hardin and the victim. Reeves attempted to step between the two, but was unable to stop the fights.

Reeves testified he found the shank on the floor of the cellblock

where Ogle was supposed to have dropped it. He testified he retrieved the knife because he didn't want his enemies to stab him with it.

Reeves attempted to send Hardin a note while they were confined in separate cells. The note, which was intercepted by prison officials, recited that Ogle was "going to draw up an affidavit that he was the one, he has made his mind up." Hardin stated in the note that it was imperative for them to obtain the services of a particular inmate, a jailhouse lawyer, to draft an affidavit for Ogle's signature. The State contended that the note indicated Ogle was going to take the blame for the murder committed by the appellants.

State v. Larry David Reeves & George Edwin Hardin, No. 3, 1989 WL 73005 (Tenn. Crim. App. filed July 5, 1989).

After the jury returned the guilty verdict, the trial court imposed a sentence of imprisonment for life. The trial court reserved ruling on the issue of whether the life sentence would be served consecutively or concurrently to the petitioner's current sentence until the hearing on the motion for new trial. However, on the date scheduled for the hearing, the original trial judge was hospitalized and unable to hear the motion.

Petitioner claims the new trial motion and sentencing issues were scheduled for hearing on June 8, 1988. When the original trial judge fell ill, the Supreme Court designated a second trial judge to hear motions. However, petitioner maintains no order was entered appointing the substitute judge. The motion for new trial and sentencing issues were determined on September 1, 1988. Petitioner said that even though no order was entered denying the new trial motion, a notice of appeal was filed on September 27, 1988. The direct appeal was considered by the Court of Criminal Appeals on July 5, 1989 in State v. Larry David Reeves & George Edwin Hardin, No. 3, 1989 WL 73005 (Tenn. Crim. App. 1989)(perm. to app. denied Oct. 2, 1989).

On August 30, 1990, the original trial judge signed a judgment that ordered the petitioner's life sentence to be served consecutively to the sentence petitioner was serving prior to this murder conviction. However, on April 12, 1996, the judge concluded that the mandates of Tennessee Rule of Criminal Procedure 32 (governing the imposition of consecutive or concurrent sentences) had not been met and concluded that the life sentence must be served concurrently. An order entered April 12, 1996 purported to correct the prior order and to reflect the service as concurrent. A habeas corpus petition followed.

In his habeas corpus petition, petitioner claimed this judgment was invalid, and therefore, that he is illegally restrained. Therefore, he assigns as error the trial court's denial of his habeas corpus petition. The petitioner maintains the judgment is invalid because the trial court lost jurisdiction upon the filing of the notice of appeal on September 27, 1988. Next, he claims the judgment is

invalid, and otherwise incomplete, because there are no minute entries reflecting the jury's verdict and the trial judge's approval of the verdict or sentence. Finally, petitioner argues that because the trial court's post-appeal order was the ultimate judgment of the trial court, the appellate court lacked jurisdiction to entertain his direct appeal because at the time of the appeal no judgment had been entered.

ANALYSIS

The petition for writ of habeas corpus provides that any person who is in prison or is restrained of his or her liberty may inquire into the reason for such imprisonment and restraint. Tenn. Code Ann. § 29-21-101. The purpose of the writ is to obtain immediate relief from illegal confinement and to liberate those who may be confined without sufficient cause and deliver them from unlawful custody. State ex rel Brown v. Newell, 216 Tenn. 284, 391 S.W.2d 667 (1965). The primary purpose of the writ of habeas corpus is to test the legality of the imprisonment or restraint of the individual. State v. Warren, 740 S.W.2d 427 (Tenn. Crim. App. 1986).

Habeas corpus relief is proper if the petitioner demonstrates that the challenged judgment is void as opposed to merely voidable. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). A judgment is void when "it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." State v. Ritchie, 20 S.W.3d 624, 630 (Tenn. 2000). It is the petitioner's burden to establish by preponderance of the evidence that a judgment is void or the term of imprisonment has expired. State ex rel Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1994).

Tennessee Code Annotated section 29-21-107 sets forth the following formal requirements of an application for a Petition for Writ of Habeas Corpus:

(a) Application for the writ shall be made by petition, signed by the party for whose benefit it is intended, or some person on the petitioner's behalf, and verified by affidavit.

(b) The petition shall state:

(1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;

(2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal

process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;

(3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and

(4) That it is first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

Tenn. Code Ann. § 29-21-107.

In the present case, the trial court initially found that the petitioner failed to properly verify the petition in accordance with the mandates of Tennessee Code Annotated Section 29-21-107. Improper verification alone is a sufficient basis upon which to dismiss a habeas corpus petition. See Hickman v. State, 153 S.W.3d 16, 21 (Tenn. 2004) (a petition for writ of habeas corpus may be dismissed when the formalities established by this statute have not been met). Notwithstanding this failure, the trial court considered the balance of the petition in light of the strict, and limited, requisites of the habeas corpus statute. Following this review, the trial court dismissed the petition.

Although the petition fails to meet the technical statutory requirements, this Court will also examine the merits of the claims contained in the petition. Here, petitioner was convicted of first degree murder which, at that time, carried two possible punishments – death or imprisonment for life. Tenn. Code Ann. § 39-2-202(b)(1982). Petitioner was sentenced to imprisonment for life which, pursuant to an eventual trial court order, was ordered to run concurrently with the sentence he was serving at the time of the homicide charge.¹ Accordingly, this sentence is valid under the sentencing act in place at the time of petitioner's conviction and has not expired.

Because the petitioner's sentence has not expired, the only remaining potential ground for relief in this habeas corpus action is that the judgment is void as opposed to being merely voidable. In order to prevail on such a claim, the petitioner must prove by preponderance of the evidence that the Lauderdale County Circuit Court lacked jurisdiction. In essence, the petitioner here is asserting

¹ Although he ruled on the motion for new trial, the substitute trial judge apparently did not enter an order as to the manner of service of the life sentence. The original trial judge entered a 1990 order (post-appeal) finding the life sentence would run consecutively to the sentence petitioner was serving at the time of the instant offense. However, the 1990 order was reversed by the trial judge in a 1996 order in which the judge concluded because the record failed to make the requisite finding for imposition of consecutive sentencing, the petitioner's life sentence would run concurrently with the previously imposed sentence. As noted by the State (and as referenced by the trial court in its 1996 order), Tennessee Rule of Criminal Procedure 32 provides that if a judgment is silent on the issue of consecutive versus concurrent service of sentences, the sentence shall run concurrently.

that, although the Lauderdale County Circuit Court had jurisdiction of the criminal case, the judgment is invalid (i.e. void) for the reasons previously asserted. However, petitioner's own contention of inadequacies in the court minutes, essentially illustrates that the judgment is voidable rather than void. In order to prevail in a habeas corpus action upon a claim of a void judgment, the judgment must "appear upon its face or the record of the proceeding upon which the judgment was rendered that the convicting court was without jurisdiction or authority." State v. Ritchie, 20 S.W.3d 624, 630 (Tenn. 2000). Here such is not the case.

Tennessee Code Annotated section 29-21-103 authorizes the trial court to dismiss a habeas corpus petition without a hearing if the petition fails to demonstrate the judgment is void on its face. An evidentiary hearing is not warranted if evidence of lack of jurisdiction does not appear on the face of the judgment or in the record of the underlying case. State v. Ritchie, 20 S.W.3d 624, 631-32 (Tenn. 2000). Therefore, we find no error in the trial court's dismissal of the petitioner's petition without an evidentiary hearing or appointment of counsel.

We conclude the petition fails to establish on its face that the judgment was void or that the court lacked jurisdiction. Therefore, the trial court was within its authority in dismissing this petition without an evidentiary hearing. Accordingly we affirm the judgment of the trial court.

J. S. DANIEL, SENIOR JUDGE